Neutral Citation Number: [2020] EWHC 1128 (QB)

Case No: QA-2019-000146

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2020

Before:

MR JUSTICE FREEDMAN

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Between:

Mr Abbas Mukhtar Lunat	**Claimants/**
Mr Mukhtar Mohmed Lunat	**Respondents**
- and -	
Mr Adam Moosa Lunat	**Defendants/**
Miss Fatima Lunat	**Appellants**

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The Claimants did not take part in this hearing
Mr Liam Varnam (instructed by **DV Solicitors**) for the **Defendants**

Hearing date: 28th April 2020

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Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Freedman:

Introduction

1. This is the oral renewal of an application for permission to appeal against a judgment of HH Judge Johns QC ("the Judge"). Sitting in the County Court at Central London on 9th May 2019, the Judge ordered that the beneficial ownership of a property at 141 Field Road Forest Gate London E7 9DH ("the Property") owned in law by the Appellants (Adam Lunat and Fatima Lunat) were owned beneficially by as to 50% by Mukhtar Lunat ("Mukhtar") and as to 50% by Adam Lunat ("Adam") and Fatima Lunat ("Fatima"). The Judge rejected the case of Mukhtar that as a result of second agreement, this agreement was replaced by an agreement whereby Mukhtar became the sole beneficial owner of the Property. The Judge also rejected the case of the Appellants that they were the joint and sole beneficial owners of the Property. Mukhtar is an uncle of Adam and Fatima. Adam and Fatima are brother and sister. Another uncle featured, namely Rafiq Lunat ("Rafiq").

2. The Property was purchased for £249,500 in April 2007. It was common ground that £105,000 was funded by a mortgage in the joint names of Adam and Fatima. The balance of £144,500 was paid towards the property ("the Upfront Payment") as follows. According to the Appellant's case, a sum of £117,043.89 was paid by Rafiq and sums totalling £32,000 by Adam and Fatima (collectively "the Appellants"). Mukhtar said that he provided these moneys to Rafiq and to the Appellants respectively.

3. Mukhtar's case was that he agreed to make the Upfront Payment and that Adam and Fatima would take out the mortgage. Mukhtar agreed to pay the mortgage from rental income and to discharge other payments at the Property. Any profits would be shared between Mukhtar as to 50% and by the Appellants as to 50%. The Property would be held on trust with Mukhtar having 50% beneficial ownership and the Appellants jointly holding 50%. Mukhtar says that that changed subsequently because the Appellants wanted to pull out of this agreement and to replace it with an agreement whereby Mukhtar would have the entire beneficial interest in the Property, would manage the Property and receive the whole of the rental income from the same.

4. The witness statement of Mukhtar was that he had provided payments of £303,964.39 to his brother Rafik. There were no bank statements to prove that this was the case. His evidence was very unsatisfactory and inconsistent as the Judge stated at paragraphs 38 and 39 of the judgment. He did not provide any evidence to show that he possessed such sums, still less the sum of over £300,000 referred to in his witness statement. There were bank statements of Rafik which did not identify Mukhtar as the source of a payment. He was very vague as to how these sums were acquired and then paid out by him. That observation of the Judge was well made out as was apparent when Mr Varnam took the Court to parts of the transcript of the oral evidence of Mukhtar. The evidence was also inconsistent: the pleaded case was that Rafiq lent money to Mukhtar, but the witness statement was that Mukhtar lent the money to Rafiq.

5. The case of the Appellants was that he and his sister were the legal owners of the Property. They were the mortgagees. The money to pay for the Property came from £32,000 paid for by them from their own resources, of which £9,000 could be evidenced from a bank account. The balance of the cash payment came from their uncle Rafiq, which could be demonstrated. This was a donation to them which is apparent from documents in 2007, and in particular a document dated 26 February 2007 from Rafiq to whom it may concern. There were no documents to show that Mukhtar was the source of these funds. It was inconsistent with his receiving state benefits. His evidence was contradictory about the passing of money between him and Rafiq saying once that Rafiq was lending money to him and that other times that he was lending money to Rafiq. The story was said to be incredible. In any event, the Judge did not find Mukhtar to be a reliable witness: hence rejecting the story about the Respondents having 100% beneficial ownership.

6. It was therefore submitted that there was no basis for the Judge to find that the Upfront Payment was provided by Mukhtar. Accordingly, it was submitted that if it did not come from Mukhtar, it was implausible that there was any agreement to share the beneficial interest in the Property.

7. The Judge's reasoning in his judgment was as follows. There were three questions which were *"central related questions of fact"*:
   (1) was there an agreement at the time of acquisition of the property;
   (2) who provided the balance of the purchase price of the property;
   (3) who paid the monthly mortgage instalment [J/12]?

8. The Judge first considered whether there was an agreement to have beneficial ownership other than as per the legal interests. He found that that this was proven because of a number of features, namely
   (1) it reflected Mukhtar's evidence as to the original agreement [J/17];
   (2) it fitted with the sharing of rental income as per the Appellants' case [J/18];
   (3) there was a letter from Adam dated 22 May 2017 where he accepted that it was owned as to 50% by him. Although he sought to say that the other 50% was his sister Fatima's, in context that meant Mukhtar owned the other 50% [J/19-J/23];
   (4) the correspondence threatening to report Mukhtar to the authorities and the letters sent were to the effect that Mukhtar was collecting benefits whilst an owner of the Property. The Judge found, despite submissions to the contrary, that Adam was the author of these letters. The letters were to the effect that Mukhtar was an owner of the Property [J/23-28].
   (5) Rafiq wrote an email stating that he wished to remain neutral blaming both parties for the dispute and stating that neither side should be entitled to 100%. This also fit with conclusion that there was an agreement as to 50%. That is significant considering the moneys which came from his account [J/29].
   (6) Mukhtar carried out significant works to the property referred to in his witness statement at [J/30]. He is unlikely to have carried out those works without having any beneficial interest in the Property: see [J/16-J/30].

9. The Judge rejected the part of the case that Mukhtar was to be paid half of the deposit and the case that there was a second agreement for 100% of the beneficial interest to pass to the Respondents [J/31-32].

10. He then considered who paid the balance of the purchase money. At [J/35], the Judge dealt with how closely inter-related the first and second questions were. He said the following:

"Mr Varnam submitted that if the balance of the purchase money did not come from Mukhtar it was implausible there was any agreement he should have a 50% share of the property; nothing else being put into the endeavour of acquisition to justify such an interest. I agree with the logic of that submission. But having found such an agreement for the reasons that I have given, it is a logic that points firmly to the conclusion that Mukhtar did indeed provide the balance of the purchase price. It is the best explanation of the agreement, which I have found that he was to be a 50% owner."

11. In other words, Mr Varnam's submission was to look at the second of the Judge's three questions and if the balance did not come from Mukhtar, then it was implausible that there was an agreement to share beneficial ownership. The Judge accepted the logic of that position. However, he evaluated that having found an agreement for the reasons set out, this provided support for the conclusion that the Upfront Payment was provided by Mukhtar.

12. That was not the end of the consideration of the question as to whether the Upfront Payment was provided. The Judge considered other matters which might indicate the contrary including especially the unsatisfactory aspects of the evidence of Mukhtar as regards the proof of his provision of the Upfront Payment. The Judge referred to the absence of contemporaneous evidence to support payments by him to Rafiq or the Appellants, to the vagueness of his evidence and to the inherent contradictions. Nevertheless, this was to be balanced against inadequacies of the evidence of the Appellants [J/38-39].

13. The Judge put into the consideration the position as regards Rafiq. The case of the Appellants did not have reason why Rafiq was, on their case, content to provide such large sums without expecting any interest in the Property. This difficulty did not arise on Mukhtar's case in that that Rafiq was in effect simply passing on money for Mukhtar. More precisely, Mukhtar's case was that he was repaying moneys lent by paying the moneys to the order of Mukhtar. This is to be read alongside the finding at [J/29] that Rafiq's support in an email for a position whereby neither Mukhtar or Adam received a 100% share fit with the conclusion that there was an agreement of a 50/50 ownership (question 1) and that Rafiq did not provide the money (question 2). The position of Adam as regards Rafiq was confused and inconsistent as pointed out at [J/40]. All of this in turn casts doubt on the letter of Rafiq dated 26 February 2007 which says that the moneys paid by Rafiq were donated by him.

14. The Judge evidently did not see the absence of obvious means of Mukhtar as being destructive of his case. On the contrary, he saw the use of Rafiq and the letter of 26 February 2007 as not identifying Mukhtar as being explained by Mukhtar's being a claimant for income support [J/38].

15. There was almost no evidence to show that the Appellants provided the money. The only document showing that the Appellants provided money was the bank statement evidencing the payment into the account of a sum of £9,000, but nothing in respect of the other sums of £10,000 and £13,000. Further, there was no evidence as to the source of the £9,000 [J/38]. In addition to the unsatisfactory evidence of Adam as regards the Appellants' contributions to the Upfront Payment, the Judge rejected evidence of Adam about how he came to make mortgage payments over and above his monthly salary [J/42].

16. Taking into account the matters referred to in the judgment, the Judge found that it was Mukhtar which provided the Upfront Payment [J/41]. The Judge rejected an application for permission to appeal on the ground that his decision rested on findings of fact for which detailed reasons had been given and therefore there were no real prospects of success. This application was renewed on paper before Mr Justice Julian Knowles. On 7 March 2020, he rejected the application on paper. He found that the application turned entirely on issues of fact and the credibility of various witnesses. He said that the Judge considered the issues and gave detailed reasons and that there are no arguable grounds for suggesting that he was wrong in a way that would enable an appeal court to intervene. He said that the grounds of appeal were no more than an attempt to re-litigate the issues of fact, and that no issue of law was involved.

Grounds of appeal

17. The grounds of appeal are as follows:

    Ground One: In assessing the question of what agreement (if any) had been reached between the parties concerning the ownership of the Property, the judge artificially separated the question of the agreement reached from the question of whether the Second Respondent was the source of the upfront payment towards the purchase of the Property

    Ground Two: In deciding that the Second Respondent was the source of the upfront payment towards the purchase of the Property, the judge took into account irrelevant factors, namely his conclusion that the agreement between the parties was as described by the Second Respondent, which was itself erroneous for the reasons set out in ground one

    Ground Three: In any event, the judge's conclusion that the Second Respondent was the source of the upfront payment was one which no reasonable judge could have reached

    Ground Four: In considering whether the Second Respondent was the source of the upfront payment, the judge wrongly reversed the burden of proof, and applied a higher standard of scrutiny to the Appellants' evidence than to the Respondents'

    Ground Five: In dismissing the Appellants' counterclaim the learned judge erred in that the basis for the dismissal of the counterclaim was his conclusion that the

Second Respondent had a beneficial interest in the Property, which was itself erroneous

Ground One

18. The statement that it is necessary for a trial judge to consider all of the evidence in order to reach a conclusion is undoubtedly correct. In my judgment, the Judge did that if not in the way which the Appellant suggests. First, he recognised that the three questions were related [J/12]. Secondly, he recognised the tension between the approach of the Appellants to start with Question 2 and then find that that informed as to the answer to Question 1, or to start with Question 2 and to find that that informed as to the answer to Question 1. In the submission of Mr Varnam, such would be the force of a finding that the Upfront Payment not being provided by Mukhtar that it would render the agreement of 50/50 sharing implausible. The logic of which submission was accepted by the Judge [J/35].

19. In my judgment, a Judge in an appropriate case was entitled to work either way, that is from the answer to Question 2 into the answer to Question 1 or from the answer to Question 1 to the answer to Question 2. There were reasons why the Judge's approach was particularly apposite. The reasons given for the agreement about beneficial ownership are powerful and are not contradicted (rightly) in the Grounds of Appeal or in the written and oral argument. There was a finding of admissions of Adam about the agreement of sharing the beneficial ownership between Mukhtar and Adam/Fatima. Further, the other findings about the sharing of rentals, the contribution of Mukhtar to improvements and the matters set out above about Rafiq entirely justify two matters, namely that these were matters capable of establishing an agreement and that they together by themselves pointed to the conclusion that Mukhtar did indeed provide the Upfront Payment. These were findings which the Judge was entitled to reach.

20. Whilst it is right that the Judge separated the Upfront Payment into Question 2, he then carried out the balancing act in Question 2 considering all of the factors referred to above. Having considered that all of these matters led to the conclusion that Mukhtar provided the Updated Payment, he did survey all the relevant evidence as required in the cases.

21. There are cases where Judges make a finding by reference to one section of the evidence which is fallacious because the findings need to be based on the evidence as a whole: see *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367 at paragraphs 24, 30 and 32. It is said that the Judge could only arrive at the conclusion about whether the agreement was made by looking at the evidence about the source of the Upfront Payment at the same time. In my judgment, the above analysis shows that the Judge did not err. He was entitled to approach the matter as he did. He must have done the balancing act. It is to be inferred that in the event that the Judge had found that the answer to Question 2 was to be answered in the negative, then the Judge would have revisited the answer to Question 1. That is apparent from the logic contained in [J/35] referred to above. In fact, he did not have to do so because he answered Question 2 to the effect that the Upfront Payment was made by Mukhtar.

22. If, contrary to the above, the Judge ought to have factored Question 2 into Question 1, this would have made no difference to the overall conclusion because of all relevant factors being considered in Question 2 and/or in the judgment as a whole.

23. It is not on an appeal the function of the Court to consider whether or not this reasoning would have been followed by this Court if it had been the court of first instance. The question is whether it was wrong or there was an injustice caused by a serious procedural or other irregularity: see CPR 52.21, and on a permission application, whether an appeal would have a real prospect of success or there is some other compelling reason for the appeal to proceed. On Ground One, for all of the above reasons, the case does not satisfy the low bar of the permission test.

Ground Two

24. Mr Varnam recognises that this is closely related to Ground One. In my judgment, for all the reasons set out above, this Ground does not add anything. In particular, the matters in answer to Question 1 were highly relevant to the issue of whether the payment was made. The Judge was right at [J/35] in his logic that these factors pointed to the conclusion that the Upfront Payment was provided by Mukhtar. They were not irrelevant, but highly probative. In the circumstances, the same conclusion applies as in respect of Ground One rejecting this as a ground for permission to appeal.

Ground Three

25. The suggestion that no reasonable Judge could reach the conclusion which he did is an attempt to substitute the view of the appellate court for that of the Judge. This is arrived at by emphasising the concerns about the shortcomings of the evidence of Mukhtar. However, it fails to take into account adequately or at all the following matters, namely
    (1) the Judge had regard to the shortcomings of the evidence of Mukhtar as is particularly apparent from [J/31-32 and 38-39], yet came to an overall conclusion which was still available to him;
    (2) the Appellants have failed to have any regard to the findings of the Judge at paragraphs 16-30 of the judgment, as to which there was no answer (especially the admissions of Adam, the position of Rafiq and the payments of Mukhtar on improvements) and the fact that the Court was able to regard this as pointing to the conclusion about the source of the funds of Rafiq and the Appellants.

26. The approach of Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1 and the judgment of Brooke LJ in *Gow v Harker* [2003] EWCA Civ 1160 were followed in this case. The Judge was critical of large parts of the oral evidence. The Judge had particular regard for the inherent probabilities. The analysis of the Appellants that the case was implausible of Mukhtar having large sums of money and an absence of supporting documents does not view the case in the round. When these matters are seen in the context of the answers to Question 1 at paragraphs 16-30 of the Judgment, the Judge reached a conclusion which was available to him on the evidence and which was not wrong. There is no basis for the extreme proposition that the Judge reached a conclusion which no reasonable judge could

reach. In the circumstances, the same conclusion applies as in respect of Ground One rejecting this as a ground for permission to appeal.

Ground Four

27. It is true that the Judge referred to absences of documents and inconsistencies on both sides. However, that was not the end of the matter, because the Respondents proved their case through the answers to Question 1, their impact on Question 2 and through the Judge's evaluation of the evidence as a whole. This did not involve a reversal of the burden of proof. It is not necessary to say any further because this would be repetition of what has gone before. Accordingly, this too does not form a basis for seeking permission to appeal.

Ground Five

28. It is accepted rightly by the Appellants that this does not arise in the event that Grounds 1 to 4 are all rejected.

Conclusion

29. Rightly, Mr Varnam recognised how difficult it is ordinarily to challenge the Judge's findings of fact. That is emphasised in many cases, notably in the judgment of Lewison LJ in *Fage UK Ltd & anor. v Chobani UK Ltd & anor.* [2014] EWCA Civ 5 which referred to cases of the House of Lords and Supreme Court which stated that an appellate court should not *"interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them."* The reasons for this approach include:

"i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

…."

30. In the oft cited speech of Lord Hoffmann in *Biogen v Medeva* [1997] RPC 1 at paragraph 54 as follows:
"…The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not

permit exact expression, but which may play an important part in the judge's overall evaluation."

31. This is not one of those exceptional cases where a judge did not take proper advantage of having heard and seen the witnesses and of being able to assess their evidence. The findings are inherently an incomplete statement of the impression made upon the Judge by the primary evidence. I am satisfied that this case is very far from the kind of case where there is serious disquiet and a need to investigate the matter in a full appeal. The Judge reached findings which were available to him on the evidence. He was entitled to come to reach the conclusion which he did. There is no real prospect that a judge on appeal will come to a view that the Judge did anything which might indicate that something went wrong or that there was an injustice caused by an irregularity. This is not a case where there is some other compelling reason to for an appeal to be heard. Having looked at the application for permission afresh and independently of the reasoning of Mr Justice Julian Knowles, I have reached essentially the same conclusion, albeit as often happens in an oral permission hearing following more detailed submissions from the Appellants.

32. Despite the more detailed way in which the case has been argued and the able and attractive way in which Mr Varnam has presented his case, the application for permission to appeal is dismissed.